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Nos. 80-1190, 80-1193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of Pullman, Incorporated,
Petitioner, No. 80-1190,

UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioners, No. 80-1193,

v.

LOUIS SWINT and WILLIE JOHNSON, *et al.*,
Respondents.

BRIEF IN OPPOSITION

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Nos. 80-1190, 80-1193

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

PULLMAN-STANDARD, a Division of Pullman, Incorporated,

Petitioner, No. 80-1190,

UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioners, No. 80-1193,

v.

LOUIS SWINT and WILLIE JOHNSON, et al.,

Respondents.

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The respondents, on their own behalf and on the behalf of other black employees, filed this suit against Pullman-Standard (the "company"), the

United Steelworkers of America and its Local 1466 ("Steelworkers" or "USW") and the International Association of Machinists ("IAM")[1/] asserting violations of Title VII of the Civil Rights Act of 1964 (as amended 1972), 42 U.S. C. § 2000e and the Civil Rights Act of 1866 U.S.C. § 1981. Pullman-Standard and the Steelworkers have each filed a petition for a writ of certiorari.

The district court found that there was a "segregation of jobs [at the Bessemer plant of Pullman-Standard] prior to March 1965 - which certainly must be taken as an employment practice and policy, whether or not ever formally approved by company and union .... If all the jobs of a department wre 'consigned' to employees of the same race, the department was, of course, totally segregated...." A 197.[2/] Both courts below held that racial segregation was practiced in every conceivable aspect of employment at the Bessemer

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1/ By pretrial order, leave was granted to add IAM as a defendant for the purpose of enabling the court to fashion a full remedy. See App. A, one of two apprendices to this Brief.

2/ "A" refers to the "Appendix to Petition for Writ of Certiorari" submitted by Pullman-Standard.

plant.[3/] The Fifth Circuit also ruled that "racial segregation was extensively practiced at Pullman-Standard [and] in the union hall...." A 168. The pre-1965 discrimination covered assignments to jobs "in varying degrees [in] virtually every department." A 106-107.[4/]

The major issues litigated in the lower courts concerned whether the discriminatory

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3/ The district court made the following findings:

> Bathhouses, locker rooms, and toilet facilities were racially segregated. Company records - including employee rosters, internal correspondence, records of negotiation sessions, lists of persons picketing - included racial designations. In 1941 some of the 'mixed' jobs even had different wage scales for whites and blacks. All of the Company's officials, supervisors and foremen were white. Union meetings were conducted with different sides of the hall for white and black members, and social functions of the union were also segregated. (A 142.)

4/ In its petition (p. 6), the company misrepresents the district court's finding on discriminatory assignments by referring to its 1974 opinion. In its later opinion, which is the subject of this proceeding, the court reversed its position, see A 106-97.

assignments to production and maintenance jobs[5/] and discriminatory supervisory selection procedures continued during the period covered by this lawsuit and whether the seniority system was unlawful. Trial proceeded on three separate occasions. The initial 1974 trial lasted 16 days. The district court concluded that the company and unions had not engaged in unlawful practices A 1-44), but the Fifth Circuit vacated the decision and remanded the case for further trial proceed-

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5/ Neither the company nor the union raise the issue of post-Act discriminatory assignments in their statement of questions presented. Nevertheless, the company, in its statement of facts, maintains that the Fifth Circuit wrongly concluded that assignments were made on a discriminatory basis after 1965. Co. Pet. 18-20. This is in flat contradiction to its own admission that during this period 47 whites and 3 blacks were assigned to the Die and Tool (IAM) department, Co. Pet 18. These statistics demonstrate the discrimination even more clearly than those upon which the Fifth Circuit relies. They also illustrate the correctness of the Fifth Circuit's holding that the district court, in the company's own words, erred "in counting." Co. Pet. 20. Compare A 108-09 with a 162-63; see also PX 2-8, which support the Fifth Circuit's conclusion that there was discrimination in assignment.

ings. A 45-99. A second trial was held over two days in February 1977. The district court delayed ruling until after this Court rendered its decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), and then, once again held that no unlawful pratices had been committed. A 100-23. The plaintiffs moved for a new trial because Teamsters had altered the legal standard for determining the validity of a seniority system and, accordingly, there had been no evidence presented in the prior two trials relating to the bona fides of the seniority system. The district court agreed (A 134-27), and an evidentiary hearing was held. The hearing on the Teamsters issue lasted less than a day and oral testimony was presented by only two witnesses.[6/] The oral testimony was limited, but extensive documentary evidence was presented covering the institution, development and maintenance of the seniority system from 1941 to the present.

The district court found that the system was "bona fide" and lawful even though it adversely

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6/ See, infra, Argument, Pt. II.

affects the employment opportunities of black workers. A 128-52. The Fifth Circuit reversed because "[a]n analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made" [footnote omitted]. A 170. The Fifth Circuit also held that the lower court erred in concluding that the company had not discriminated in the assignment of employees and in the selection of supervisors. A 153-79.

REASONS FOR DENYING THE WRIT

The questions presented by the Steelworkers and Pullman-Standard challenge the Fifth Circuit's ruling on seniority.[7/] The company also challenges the Fifth Circuit's ruling on the selection of supervisors. The petitions are not due to be granted because they present no conflict of

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7/ One of the questions presented by the Steelworkers is cast in terms of Rule 52(a), Fed. R. Civ. P.

decisions among the circuits[8] and because they present no conflict with decisions of this Court.[9] Moreover, the decision of the Fifth Circuit reaches a proper result on the facts of this case. In any event, the Fifth Circuit opinion raises no important or new issues of law but rather applies this Court's decisions in Teamsters v. United States, supra, and Griggs v. Duke Power Co., 401 U.S. 424 (1971), to a complex factual situation (Sections I and III, infra).[10]

8/ The company does not even assert that the case presents a conflict of decisions. The Steelworkers erroneously assert that the Fifth Circuit's application of Rule 52(a) conflicts with the application of the Rule by other circuits. The Fifth Circuits's decision not only is consistent with decisions of other circuits but also expressly follows a seminal decision of this Court, United States v. U.S. Gypsum Co., 333 U.S. 364 (1948), interpreting Rule 52(a). See Section II, infra.

9/ As described in the Argument, the asserted conflicts disappear when this Court's opinions are properly applied to this case.

10/ Essentially petitioners ask this Court to perform the appellate court function of "review-[ing] the evidence and discuss [ing] specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925).

ARGUMENT

I.

IN HOLDING THAT THE SENIORITY SYSTEM WAS UNLAWFUL, THE FIFTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISION IN TEAMSTERS v. UNITED STATES.

This Court in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), neither condemned nor condoned all seniority systems which perpetuate the effects of pre-Act discrimination. Id. at 353-55. "To be sure, §703(h) does not immunize all seniority systems," id. at 353. Section 703(h) covers only "bona fide" systems; it specifically excludes any system in which differences in treatment are "the result of an intention to discriminate because of race...." 42 U.S.C §2000e-2(h) In ruling that the system in Teamsters was protected by § 703(h) the Court examined several factors: whether the system "applies equally to all races," whether it is "in accord with the industry practice and consistent with National Labor Relations Board precedents," whether it had "its genesis in racial discrimination," and whether "it was negotiated and has been maintained free from any

illegal purpose." 431 U.S. at 355-56; 346 n.28.[11/] The Fifth Circuit applied these Teamsters factors to the particular employment context presented at the Bessemer plant.[12/]

1. Neutrality. The undisputed evidence establishes that the traditionally all-black departments have the lowest median job classes at the Company; the traditionally white departments (with two exceptions) have among the highest median job classes. The district court recognized that the "No transfer with seniority carryover" rule has the likely effect of discouraging a disproportionate number of black employees from

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11/ Application of these factors by the Fifth Circuit necessarily required a careful review of the record. While respondents are reluctant to burden this Court with a factual recital, both petitions were riddled with statements that are directly contrary to the record. Respondents, therefore, are constrained to set forth the record facts on the seniority system, which appear in Appendix B to this brief (App. B).

12/ The Steelworkers claim the the Fifth Circuit's decision "robs §703(h) .. of the content which this Court ... found that Congress meant to give it." USW Pet. 23. On the contrary, the Fifth Circuit followed the balanced approach which this Court applied in Teamsters.

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transferring, if the relative economic desirability of the departments is considered. A. 134. However, the Court felt it "inappropriate" to consider economic desirability, and found the system to be neutral because in effect, it locks white employees out of the lower-paying black departments to the same extent that it locks black employees out of the higher-paying departments. It disregarded the distinction that in Teamsters, the employees who were "discouraged from transferring ... [were] not all Negroes and Spanish-surnamed Americans [but] the overwhelming majority [were] white." 431 U.S at 356.

Here the evidentiary facts are not in dispute and the Court of Appeals properly reversed the district court, which committed legal error in failing even to consider the inference of intentional racial discrimination raised by the fact that the seniority system excluded blacks from higher-paying departments.[13/] A 165-166, see

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13/ The Steelworkers distort the Fifth Circuit's statement that blacks were excluded by the first Steelworkers' contract from "better jobs." USW Pet. 16 n.9. The Fifth Circuit was referring to the fact that the departmental system was established by the contract and that there were several

Washington v. Davis, 426 U.S 229, 242 (1976) ("[n]ecessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if true, that the law bears more heavily on one race than another").

2. Rationality. It is undisputed that unionization and creation of the seniority system resulted in the separation of two racially mixed operational departments, the Die and Tool Department and the Maintenance Department, into four separate seniority units, including three one-race departments, A 136, A 166; App. B 9. The lower-paying jobs consigned to blacks were included in the Steelworkers unit while the higher-paying

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13/ continued

all-white departments. The requirement that an employee forfeit seniority upon transferring departments (A 131, 158), served as a bar to transfer and thus excluded blacks from the better paying jobs in the all-white departments. The Steelworkers further erroneously criticize the Fifth Circuit in stating that it wrongly referred to a "no transfer rule." USW Pet. 17 n.9. The Fifth Circuit did not "substitute" its judgment for that of the district court, but rather expressly adopted the lower court's appropriate characterization of the seniority forfeiture provision. Compare A 134 to A 158.

jobs were included in the IAM unit. The district court failed to consider the irrationality of dividing operational departments into separate units because this "separation into differing bargaining units was not merely, as in Teamsters, 'consistent with National Labor Relations Board precedents, ...;' it was rather required by a specific decision of the NLRB and the outcome of the elections." A 140. The Fifth Circuit ruled that the district court had once again erred as a matter of law by refusing to consider whether the division of these operational departments into racially segregated seniority units was motivated by race. A 166, A 169. Teamsters did not state, as the district court infers, that whenever a unit-system is certified by the NLRB it has an imprimatur of racial neutrality.[14/] Moreover,

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14/ Teamsters did not involve, as this case does, the development of separate bargaining units in a specific plant. Teamsters involved the division of jobs, over-the-road and city drivers, into separate seniority units in a manner which was consistently applied throughout the industry. In this case, the IAM with the cooperation of the Steelworkers and the company entered into a series of maneuvers designed to accomplish one goal -- the establishment at the Bessemer plant of a one-race unit. App. B 6-8.

the company's and unions' creation of numerous one-race departments was not justifiable by any business reason; the only consistent thread passing through the development of these departments was race. App. B 9, 13.

3. Genesis. The seniority system had its genesis in 1941 and 1942 when the IAM and the Steelworkers sought and obtained bargaining units. In its petition to the NLRB the IAM sought to exclude Blacks from its bargaining unit. App. B 4-5. As an example, the IAM petitioned for inclusion of jobs such as crane operator, machine operator and handyman when staffed by whites but did not seek those jobs when staffed by blacks. Moreover, immediately after certification the IAM and the USW traded jobs along racial lines through a 1941 inter-union agreement. Having completed these racial maneuvers, which resulted in an all-white IAM bargaining unit, the unions, then entered into collective bargaining agreements with the company, which established a departmental seniority system.[15/] The district court erred as

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15/ For evidence in the record which details the racially motivated agreement, or "clarification," between the USW and the IAM, see App. B 6-9; cf. Co. Pet. 12. In what we believe to be an irresponsible manner,--"the 'Alice in Wonderland'

a matter of law by ignoring the motives of the IAM in establishing an all-white bargaining unit[16/] and by failing to consider properly the 1941-42 genesis of the system. A 130, 142. The Fifth

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15/ continued
quality of the Court of Appeals' inferences" -- the Steelworkers criticize the Fifth Circuit's conclusion regarding the 1941 transfer of jobs. USW Pet. 18 n.11. The Steelworkers, however, do not then refer to the 1941 trading of jobs between the unions, but to a wholly separate 1944 transfer. App. B 7, 10.

16/ The district court found it "unnecessary" to determine the motives of the IAM because "the [steelworkers and the company] cannot be charged with racial bias in its response to the IAM situation." A 145. The company and the Steelworkers make the same error. Co. Pet. 16; USW Pet. 8 n.3. The issue tried in the district court is simply whether the seniority at the Bessemer plant is bona fide, or more particularly, whether an intent to discriminate entered into its creation and development. 431 U.S. at 346 n.28.

If the system had its genesis in discrimination, then the protection of §703(h) does not apply and thus a court properly may order the removal of the adverse racial consequences of the system. Teamsters v. United States, supra, 431 U.S. at 349 (absent the protection of §703(h) the seniority system falls "under the Griggs rationale").

Circuit correctly stated that the "motives and intent of the IAM in 1941 and 1942 are significant in consideration of whether the seniority system has its genesis in racial discrimination." A 169. The Fifth Circuit properly relied upon the 1941 racially motivated agreement, in concluding that

> The IAM manifested an intent to selectively exclude blacks from its bargaining unit NLRB certification considerations notwithstanding....That goal was ultimately reached when maneuvers by the IAM and USW resulted in an all-white IAM unit. A 69-70. 17/

The unionization and the establishment of a contractual departmental seniority system in 1941-42 not only resulted in the establishment of the "seniority forfeiture" obstacle to transfer to the then existing four all-white departments,

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17/ Although stating that the "objective facts are not greatly in dispute" (A 145), as they could not be since the facts are set forth in NLRB and company documents, the district court failed to consider this racially directed transfer because of its view of the applicable law. This inter-union swapping and maneuvering of jobs based on the race of employees in those jobs regardless of their functional relationship, contradicts the assertion of the company that the unions "had no real choice". Co. Pet. 22.

but more importantly resulted in doubling the number of one-race departments. [18/]

4. Maintenance. The racial consequences of the seniority system were maintained and indeed expanded by the parties to the collective bargaining agreements. Under those agreements, an employee foreits accumulated seniority when he voluntarily transfers from the bargaining unit of one union to the bargaining unit of another. The criterion used for seniority within the Steelworkers bargaining unit[19/] was "departmental" form 1942 through 1947, then "occupational" from 1947 through 1954, and then once again "departmental" after 1954. The 1954 seniority system at

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18/ As a result of unionization and the subsequent inter-union agreement, five additional one-race departments were created. Once again the Steelworkers rely upon invective rather than upon a review of the record when they state that the Fifth Circuit's ruling that "a substantial number of one-race departments were established upon unionization" is "sheer invention." USW Pet. 16 n.9. The court below is correct. App B 8-9.

19/ As a result of the racial maneuverings by the IAM and USW in the creation of their respective bargaining units, and the negotiation of the "no-transfer rule", App. B 3-9, n. 13, supra, all the blacks at Pullman were concentrated in the USW unit.

the Bessemer plant remained "virtually unchanged throughout the next eighteen years of collective bargaining." A 131, 158; App. B 15.

The Fifth Circuit properly concluded that the "creation of the new departments in the years subsequent to unionization involved continued separation of the races." A 167. In examining the "gestalt of the system" the district court erroneously failed to examine the racial consequences of the departmental changes. A 140-41. In an employment context where race receives constant consideration in the allocation of jobs, employee badge numbers, etc., when a series of acts, such as the creation of new one-race departments, adds to the discriminatory consequences of the system then there is created an inference of segregative intent. See, Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 266-67 (1977); Keyes v. School District No. 1, Denver, 413 U.S. 189, 207-08 (1973); United States v. Board of School Comm'rs, 573 F.2d 400, 412 (7th Cir.), cert. denied, 439 U.S. 824 (1978).

The departmental changes which occurred in 1954 at the time of the switch from occupational to departmental seniority show a clear pattern of

discrimination.[20] When the departmental structure once again, in 1954, became critical in establishing a worker's employment opportunity, as in 1942-47, five brand new, one-race departments were created within the USW unit.[21] App. B 13-14.

20/ Contrary to the representations of the union and the company, respondents have not challenged "departmental service,...as the measure of seniority", USW Pet. 5, nor a departmental system per se, Co. Pet. 23-25. What respondents have challenged on the facts of this case is the manner in which the seniority system was established and maintained at Pullman. Considerations of race permeated the establishment of the bargaining units, the creation of the departments and the genesis and maintenance of the system.

21/ One of the five was the Janitor Department. The Steelworkers assert that the separation of the job of janitors, a "black" job, from the job of watchman, a "white" job, occurred in 1952 (USW Pet. 9), concluding therefore that the separation did not harm the employment opportunities of blacks, since an occupational seniority system was in effect in the years 1947 to 1954. In fact, the separation occurred, as the Fifth Circuit concluded (A 167), in 1954, just prior to and in contemplation of, a shift to a departmental seniority system. See PX 2-7 which show the jobs in the Safety department for 1947-52, PX 8 which shows the jobs in the Plant Protection department in 1953 and PX 9 which shows the janitors in an all-black Janitors Department and the watchmen in an all-white Plant Protection department in 1954.

In conclusion, the Fifth Circuit correctly determined that the district court had wrongly applied the law, had failed to consider relevant facts, and had made clearly erroneous findings of fact. In applying Teamsters to the particular facts at the Bessemer plant,[22/] the Fifth Circuit reached the proper legal conclusion -- the seniority system was discriminatory and unlawful:

> We consider significant in our decision the manner by which the two seniority units were set up, the creation of the various all-white and all-black departments within the USW unit at the time of certification and in the years thereafter, conditions of racial discrimination which affected the negotiation and the renegotiation of the system, and the extent to which the system and the attendant no-transfer rule locked blacks into the least remunerative positions within the company. (A 171).

The company also asserts that a question presented by this case is whether resolution of the issue on bona fides of a particular seniority system includes application of a "but for" test.

22/ Contrary to the Steelworker's assertions that this case has affected the "seniority expectation of over 2,000 employees ..." (USW Pet. 26), this plant was closed permanently in January 1981.

Co. Pet. 23. Nothing in Teamsters requires such a test. Teamsters held that a court must inquire into whether an intent to discriminate entered into the adoption and maintenance of a seniority system.[23/]

In any event, the question presented -- "whether ... a departmental seniority system would have been adopted ... even if there had been no racial aspect involved," Co. Pet. 25 -- is not posed by the instant case. The Fifth Circuit's opinion and the position of the respondents, (see n.20, supra), do not depend upon any per se criticism of "departmental" seniority but rather depend upon the specific application of seniority

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23/ In Mt. Healthy v. Doyle, 429 U.S. 274 (1977), this Court articulated "a rule of causation" that had been utilized in "other areas of constitutional law [where] this Court ha[d] found it necessary to distinguish between a result caused by a constitutional violation and one not so caused." Id. at 286. The Mt. Healthy standard, developed for an individual case involving an allegation of a First Amendment violation is inapposite to the analysis of whether a seniority system is lawful under Title VII. This Court has set forth the applicable standard in Teamsters and the Fifth Circuit followed that standard.

to the gerrymandered departmental and unit structure at the Bessemer plant.[24/]

II.

IN REVIEWING THE DISTRICT COURT'S DECISION, THE FIFTH CIRCUIT PROPERLY DISCHARGED ITS FUNCTION UNDER RULE 52(a) IN A MANNER CONSISTENT WITH THE DECISIONS OF THIS COURT AND WITH THE DECISIONS OF OTHER CIRCUITS.

The Court of Appeals, after reviewing the record before it, concluded that:

24/ The company suggests that this Court grant certiorari to consider the question of whether Title VII requires a showing of causality, because there is a "current controversy" over this question. Co. Pet. 25 n.24. In support of this contention, the company cites three circuit court decisions, id. These cases, one involving a "no-beard" policy, another involving an individual alleging reverse discrimination and a third involving the alleged discriminatory discharge of an individual who had lied on his application, are inapposite. The question of whether those courts applied proper Title VII standards to the facts of those cases is not before this Court. In any event, those opinions present no conflict with the Fifth Circuit's opinion, nor are they even related to the issue of whether the seniority sytem is lawful.

> An analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made.

A 170. This standard of review, articulated in the seminal decision of this Court in United States v. U.S. Gypsum Co., 333 U.S 365 (1948), is the one used.

The Steelworkers attempt to convince this Court that the Fifth Circuit's reasoning was based on the standard articulated in East v. Romine, Inc., 518 F.2d 332, 339 (5th Cir. 1975). It is clear from the decision of the Court of Appeals that this is not so. The Court of Appeals cites East for the proposition, established long ago by this Court, that the ultimate conclusion of whether the entirety of the facts establishes a statutory violation is an appropriate determination for an appellate court to make. Baumgartner v. United States, 322 U.S 665, 670-71 (1943), followed in Causey v. Ford Motor Co., 516 F.2d 416, 420 (5th Cir. 1975); cf. USW Pet. 21 n.14. Thus the Court of Appeals properly notes that while appellate courts can overturn subsidiary facts only under the clearly erroneous standard,

they can, and indeed are under a duty to, make an independent determination of whether a violation of Title VII has been established.[25/] As this Court has recently noted, "the ultimate conclusion by the trial judge, [of violation of the Sherman Act], is not to be shielded by the 'clearly erroneous' test...." United States v. General Motors, 384 U.S. 127, 142 n.16 (1966)[26/]

Not only did the Court of Appeals follow the correct standards under Rule 52(a), but the district court here made numerous errors of

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25/ See, Norris v. Alabama, 294 U.S 587, 589-90 (1934): "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied."

26/ The Steelworkers criticize a number of the conclusions reached by the Court of Appeals, see, e.g., USW Pet. 21 nn.9, 10, and 11. As we have shown earlier, their criticisms, based on distortions of the record, are totally unwarranted, as each of the Fifth Circuit's conclusions had abundant factual support in the record and was reached through an application of the correct legal principles. See supra nn.13, 21, 23, 26.

law,[27] and, as the Court of Appeals correctly

27/ The district court's erroneous view of controlling legal principles manifested itself in several distinct ways, including the following:

(i) The district court's failure, indeed refusal, to consider the motives of the IAM with regard to either genesis or maintenance, see supra, p.13-17, and n.16;

(ii) the district court's determination that whether the 1941-42 or 1954 period of time was selected for consideration of the genesis factor was inconsequential. See A 142; cf. App. B 3-9, 13;

(iii) the district court's apparent view that NLRB certification somehow insulated the system from a finding of irrationality; see supra, p. 12;

(iv) the district court's failure to consider the seniority system's exclusion of blacks from higher-paying departments, see supra p. 10 and n.13;

(v) the district court's failure to consider the creation and maintenance, through the collective bargaining process, of an ever-increasing number of one-race departments, see supra pp. 15, 18;

(vi) the district court's failure to consider the racial consequences of later changes to the seniority system, see supra, 16-18;

As did the district court in Dayton v. Bd. of Educ. v. Brinkman, 443 U.S. 526, 535-36 (1979), the district court "ignored the intentional maintenance" of a discriminatory seniority system.

noted, Rule 52(a) has no application "where findings are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand." A 178 n.6. See United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960); United States v. General Motors, supra, 384 at 142; Kelley v. Southern Pacific Co., 419 U.S. 318, 323 (1974).

In an attempt to bolster their argument, petitioners claim that the district court's conclusion was reached only after listening to "weeks of testimony." USW Pet. 16. As discussed in the Statement of the Case, the district court granted plaintiffs' motion for a new trial limited to the Teamsters issue. A 126. The hearing on that issue lasted less than three hours, during which time the district judge heard the testimony of only two witnesses.[28/] In other words, it

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28/ These witnesses were called by respondents. Mr. Samuel Thomas, a black employee at the company since 1946, testified as to segregation in seating at the union hiring hall and at union sponsored social activities (Tr. 18-19), and the racial composition of union officers and negotiating groups (Tr. 23-24). The other witness, Mr. Willie James Johnson, also a long-time black employee, testified regarding the segregated seating (Tr.30), segregated facilities at the company and union

"was essentially a 'paper case.'" United States v. General Motors, supra, 384 U.S at 142 n.16[29/] The Steelworkers' reliance, therefore, on United States v. Yellow Cab Co., 338 U.S. 341 (1949) and United States v. Oregon State Medical Society, 343 U.S. 326 (1952) is misplaced. In both of those cases the resolution of issues of intent turned "peculiarly upon the credit given to witnesses by those who see and hear them." 338 U.S. at 342. This Court reaffirmed this view in Oregon State Medical Society, cited by the Steelworkers, who chose to eliminate a very relevant portion of the quote, which it reads in full as follows:

28/ continued

hall (Tr. 30-31), racial identity of various International representatives (Tr. 30), as well as the handling of grievances regarding racial discrimination. (Tr. 32-33). Neither witness was subjected to extensive cross-examination and neither petitioner attacks the credibility of these witnesses.

29/ The documentary evidence consisted of over 100 exhibits for plaintiffs (respondents) and 27 for defendants (petitioners).

> There is no case more appropriate for adherence to [Rule 52(a)] than one in which the complaining party creates a record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses. 341 U.S. at 332 (emphasis added).

Unlike the "ordinary lawsuit" that "depends for its resolution on which version of the facts in dispute is accepted by the trier of fact." U.S. v. Yellow Cab Co., 338 U.S at 341, quoting from National Labor Relations Board v. v. Pittsburgh S.S. Co., 337 U.S. 656 (1949), this case depends upon the correct application of Teamsters principles to facts culled from documentary evidence.[30/] Here, the Court of Appeals performed "its unavoidable duty ... and concluded that the District Court had erred. Dayton v. Bd. of Educ. v. Brinkman, supra 443 U.S. at 534 n.8.

30/ The Fifth Circuit has not held that the standards of Rule 52(a) do not apply to a review of findings on discrimination purpose, as the Steelworkers assert. USW Pet. 22. Further, there is no conflict between the Fifth Circuit and

30/ continued

any other circuit over the applicable standards, as the Steelworkers imply. Id. Here, the district court failed to consider properly documentary evidence because of its erroneous view of controlling legal principles, and the Court of Appeals correctly reversed. The cases cited by the Steelworkers (id.) did not involve crucial errors of law. In addition, those cases concerned individual discharge and promotion claims, that revolved around the testimony of witnesses, thereby invoking particularly the requirement of Rule 52(a) that "due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." See EEOC v. Chesapeake & Ohio Ry. 577 F.2d 229, 233 (4th Cir. 1978) (depended on credibility of witness' testimony and the inference to be drawn from sharply conflicting evidence); Kunda v. Muhlenberg College, 621 F.2d 532, 544 (3rd Cir. 1980) (district judge had opportunity to observe principal witnesses); Duckett v. Silberman, 568 F.2d 1020, 1023 (2nd Cir. 1978) (credibility a major factor) and reviewing court noted, trial judge was there, "we were not"); Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106, 109 n.1 ("...the opportunity for first-hand observation may be especially important in [a case] such as this, ..." but court goes on to note it would attempt to "detect infection from legal error ...."); Pack v. Energy Research & Development Administration, 566 F.2d 1111, 1113 (9th Cir. 1977) (involving opinion

III.

IN CONCLUDING THAT THE COMPANY UNLAWFULLY DISCRIMINATED IN THE SELECTION OF SUPERVISORS, THE FIFTH CIRCUIT FOLLOWED THE PRINCIPLES ESTABLISHED BY THIS COURT IN A MANNER CONSISTENT WITH THE APPLICATION OF THESE PRINCIPLES BY OTHER CIRCUITS.

The district court found that respondents had made out a prima facie case of discrimination with respect to promotions to supervisory positions, based on the statistics presented at trial:

> At the time of trial only some 10% of Pullman's salaried foremen were black, a figure which is substantially below that expected from the labor market - which ranges from 25 to 35% black, depending on the age group and area selected - or from Pullman's own work force - which ranges from approximately 45 to almost 50% black, depending upon the time selected.

30/ continued

testimony of plaintiff's qualifications; Bostic v. Boorstin, 617 F.2d 871, 875 (D.C. Cir. 1980) (district court required to resolve conflict in expert testimony); Silberhorn v. Gen. Iron Works Co., 584 F.2d 970 (10th Cir. 1978) (district court required to evaluate testimony of co-workers and supervisors regarding plaintiff's behavior).

A 110. The district court had also previously found that "[s]election of foremen has been largely a matter of subjective evaluation by an all-white group of supervisors, ..." A 26. The Court of Appeals, in its earlier opinion, agreed with the district court, holding:

> The appointment of supervisory personnel at Pullman-Standard is done totally subjectively. There are no established criteria for selection of new foremen. .... In 1966, the first black was promoted to one of the 431 existing salaried foreman positions. Four years later, there were only nine black salaried foremen while there were 151 white foremen. At the time of trial, there were 13 departments in which blacks had never been offered either salaried or temporary forman positions. Since 1966 and until the time of this trial there were at least 59 salaried formen vacancies. Only 12 of those were filled by blacks.

The company recognizes that classwide discrimination in promotion for foremen has been shown Co. Pet. 25; however, the company contends that the Court of Appeals erred in concluding that the company had failed to rebut the prima facie case. The company does not assert that the decision of the Court of Appeals conflicts with the decisions of this Court or with those of other circuits; rather, the company asserts that the Court of Appeals erred in two ways. First, by "refusing" to take into account evidence regarding

black refusals of supervisory positions. Second, by inquiring into whether the company had justified its practices under the business necessity doctrine. Co. Pet. 25-29. The company's petition is not due to be granted on either of these issues, because the first is not presented by the decision of the Court of Appeals, or the record in this case, and the second is already settled by decisions of this Court.

The Fifth Circuit did not state, as the company maintains, Co. Pet. 26, that refusals by black workers of company promotional offers could not be taken into account in rebutting a prima facie case of discrimination. In fact, the Fifth Circuit considered this evidence and concluded that, under the circumstances of this case, since black refusals of promotions were closely tied to the "very discrimination which the class members seek to eliminate," the defendant had failed to rebut the prima facie case. A 176.

The evidence established, and both courts found, that the company's practice was to make promotions to temporary foremen of any given department from employees already within that department. A 113 and A 171. The company now, for the first time, terms such a practice an

"imaginary requirement." Co. Pet. 29. Yet the company admits that only 3% of the promotions for foremen are not from the same department. Id.[31] Both courts below then considered whether this practice was justified by business necessity (A 113 and A 173).[32] The Court of Appeals held

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31/ This figure may be compared to the finding of the district court that "[o]f the 415 monthly promotions reported from January 1969 through May 1974, 403 - or 97% - were appointments of a person when in the department." A 122 n.18. Apparently the company would require a finding that all, or 100%, of the promotions were from within the department, before it would be appropriate to use the term, "practice."

32/ The district court held that "[t]he restriction of such temporary promotions to persons working in the department is a bona fide occupational qualification, justified by business necessity." A 113. Because of the district court's intermingling of two separate and very distinct Title VII defenses, the Court of Appeals discussed the distinction between the two, correctly concluding that the bona fide occupational qualification exception was not applicable to cases involving race discrimination. A 174.

that in order for the company to rely on a procedure having a disparate impact on blacks, it must show that the procedure is justified by business necessity. A 174. In so holding, the Court of Appeals was following the principles enunciated by this Court in Griggs v. Duke Power Co., 401 U.S 424 (1971). 33/

33/ See also Teamsters, supra, 431 U.S. at 349. The company asserts that the business necessity defense is applicable only in cases involving a "test or screening device." Co. Pet. 29. This assertion is plainly wrong. As this Court noted in Teamsters "[o]ne kind of practice 'fair in form, but discriminatory in operation' is that which perpetuates the effects of prior discrimination." 431 US. at 349, citing as an example the nepotism requirement at issue in Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969). Id at n.32. Similarly, the requirement, at issue in the courts below, that a person have worked in the department prior to being promoted -- in effect a kind of "grandfather clause" -- automatically precluded the consideration of blacks who but for past discrimination, would have worked in a greater number of departments.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

COURT: U.S. District Court, N.D. Ala., Sou. Div.

CASE : Swint, et al. v. Pullman-Standard, et al., CA 71-P-955

ORDER: Supplemental pre-trial conference held June 4, 1974.

1. Counsel. The following counsel were present: For plaintiffs, U. W. Clemon; for defendant Company, C. V. Stelzenmuller; and for defendant Steelworkers Union, John C. Falkenberry.

2. Class Action. The parties have made known certain facts to the court and have agreed that such facts may be considered by the court without formal hearing otherwise required under Rule 23. On the basis thereof, the court finds and concludes that the prerequisites of Rule 23(a) and 23(b)(2) are satisfied and that this action may hereafter be maintained on behalf of all black persons who are now or have (within one year prior to the filing of any charges under Title VII) been employed by defendant Company as production or maintenance employees represented by the United Steelworkers. The court concludes that individual notification of class members is unnecessary in this action under Rule 23(b)(2) but that it would be appropriate for a general notification of the pendency of this litigation to be posted at the premises of the Company. Counsel for the parties shall attempt to draft such a notification and in the event of disagreement the same shall be presented to the court for its approval.

3. Parties. Leave is hereby granted to the plaintiffs to add as additional party defendant (insofar as the relief requested may involve or infringe upon the provisions of such Union's collective bargaining agreement with the Company, it being noted however that no request for monetary relief is being sought against said Union) the appropriate entity of the International Association of Machinists. Leave is also granted for the intervention as a party plaintiff of an employee by the name of Humphrey for the presentation of his claim under Section 1981 with respect to his discharge and subsequent reinstatement without back pay.

4. Issues. The following charges are made by the plaintiffs as violations of either Title VII or of Section 1981:

(a) That a system of departmental seniority, even with changes made pursuant to a corrective action program with the Department of Labor, nevertheless perpetuates the effects of past discrimination in the assignment of black employees to generally less desirable departments. This issue subsumes the following assertions by the plaintiffs:

The transfer provisions under the agreement with the Department of Labor apply to only four departments; the transfer rights which are granted under such plan are inadequate by reason of the failure to provide red-circle rates and by reason of the restriction to a single exercise of such rights; and such rights of transfer do not apply to jobs in the machine shop represented by the IAM. (The issue relative to the machine shop may have to be severed for subsequent trial depending upon the joinder, service, and availability and readiness of the IAM with respect to the trial date already scheduled.)

(b) The Company has discriminatorily made assignments of functions to persons serving in the same job classification based on race and has discriminatorily assigned persons on the basis of race to "lateral" job classifications having the same job class.

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NORTHERN DISTRICT OF ALABAMA

JUN 5 1974

WILLIAM E. DAVIS
CLERK, U. S. DISTRICT COURT
By _____ DEPUTY CLERK

(c) The Company has discriminatorily failed to promote black production and maintenance employees to supervisory and managerial positions.

(d) As individual, non-systemic, claims, the Company has discharged the plaintiff Swint in violation of Title VII or Section 1981 and has discharged (without giving back pay on reinstatement) the potential Intervenor Humphrey in violation of Section 1981.

The plaintiffs seek back pay or other monetary relief incident to the foregoing claims of discrimination; but such issue is severed for trial, if necessary, at a subsequent date. The plaintiffs, in view of proposals made by the defendants in conference, do not intend to challenge the practice by which daily assignments and vacancies have not been publicly posted; but reserve the right to present such an issue at trial if the conference proposals by the defendants prove to be unsatisfactory.

The defendants deny the several charges of discrimination set out above and in addition assert defenses in part based upon applicable statutes of limitation and the effect of arbitration awards.

5. Discovery. The parties are given leave to proceed with further discovery provided the same be completed at least ten days prior to trial. The parties shall at least ten days prior to trial exchange a list of witnesses and documents which they anticipate utilizing at trial.

Done this the 4th day of June, 1974.

United States District Judge

APPENDIX B

APPENDIX B

THE SENIORITY SYSTEM IN EFFECT AT PULLMAN-STANDARD

INTRODUCTION

The seniority system at Pullman involves the Company and two bargaining units - one represented by the IAM and the other represented by the USW. The system at Pullman-Standard was part and parcel of the racial discrimination practiced at the Bessemer plant; it was negotiated, adopted and maintained with an intent to discriminate.

At the time Pullman-Standard was organized in 1941, considerations of race permeated the manner by which the two bargaining units were set up. With the active cooperation of the USW and the agreement of the company, the IAM sought and achieved an all-white bargaining unit. The efforts of the parties to the collective bargaining process resulted in substantially increasing the number of one-race departments that had existed at the plant prior to unionization. With the negotiation of the "no-transfer" rule, the IAM was able to maintain its all-white status, with blacks being concentrated in the USW bargaining unit.

The departments in the USW bargaining units were thereafter manipulated so that even the potential for blacks to move into better jobs in a given department was removed, these manipulations occurring significantly enough, on the eve of changes in the seniority criteria. The evidence in the record demonstrates that when the seniority criterion was broadened, i.e. "departmental," departments were less racially mixed, due to the creation of one-race departments, and therefore less likely to offer even potential opportunities for blacks to exercise seniority rights vis-a-vis whites in higher paying jobs or whites with less seniority. Similarly, when the seniority criterion was narrowed, i.e., "occupational" (1947-54), departments were likely to be more racially mixed, the limitation of opportunities for blacks to exercise seniority rights in better jobs was a fait accompli since an employee held seniority only within the occupation in which he worked. It is clear, then, that the structure of the operational departments was manipulated along racial lines, depending on how broad or restrictive the seniority criterion.

The seniority system in effect at Pullman-Standard's Bessemer plant may be viewed as having three distinct phases: the 1941-42 initial organ-

ization of the company and negotiation of the system; the 1944-54 changes in the system and departmental structure; and the 1954 return to departmental seniority. The discussion that follows details the actions taken by the parties to the collective bargaining process during each of those time periods.

1941-42: UNIONIZATION AND GENESIS OF THE SENIORITY SYSTEM

Pullman commenced operations in Bessemer, Alabama in 1929. At that time, and for the next 12 years, there were no recognized unions at Pullman. Prior to unionization, the company was divided into 20 departments: 5 one-race departments (4 of which were all-white)[1/] and 15 were

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1/ These figures, based on the record, stand in stark contrast to those set forth by the Steelworkers, see, e.g, USW Pet. 7 n.2. The Steelworkers' analysis of departmental changes during the period from 1941-1954 (USW Pet. 6-8), rests in large part upon a chart created by the district court for the purpose of describing the departmental structure in 1965. The 1965 chart, earlier criticized for other reasons by the Fifth Circuit (A 55-58), just cannot explain departmental changes which occurred over the preceeding 20 years and reliance on that chart results in numerous errors in the Steelworkers' analysis.

racially racially mixed.[2/] PX 1, 109.

The NLRB certification and subsequent "clarification"

In 1941, the IBEW, IAM, and USW, all of which had filed representation petitions, jointly participated in a representational hearing. PX 13 A151, 178.

The IAM, while claiming to represent a unit consisting only of machinists and their helpers and apprentices at Pullman, in fact sought recognition on behalf of employees in occupations which cannot properly be regarded as "machinist" occupations, e.g., cranemen, welders, wheel

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2/ The four all-white departments were: Lumber Yard, Welding, Template, and Plant Protection (job of "Janitor", not included in this department but in racially mixed "Superintendent" Department). The all-black department was the Truck Department. A-150 n.12; PX 109. The racially mixed departments included the following: Die and Tool, Forge, Maintenance, Paint, Press,Punch and Shear, Shipping Track, Steel Construction, Steel Erection, Steel Miscellaneous, Stores, Superintendent, Wheel and Axle, Wood Erection, and Wood Mill.

fitters, tool grinders, axle-finishers, and pipefitters. Moreover, the IAM did not seek to include in their unit machinist-related occupations (e.g., machine operators, punch and shear operators) in racially mixed departments. PX 13, 14, 112. In its petition to the NLRB the IAM sought to exclude blacks from its bargaining unit.3/

3/ For example, the IAM petitioned for inclusion of the job of handyman in the racially mixed Die and Tool department, where it was staffed by whites, but not in the racially mixed Maintenance Department where it was staffed by blacks; petitioned for inclusion of crane operators in the Die and Tool Department and racially mixed Wheel and Axle department, where the job was staffed by whites, but not in the racially mixed Steel Miscellaneous department where it was staffed by blacks; and petitioned for machine operator jobs in departments where the job was staffed by whites, but not in departments where it was staffed by blacks. PX 1, 13, 109. Moreover, in the racially mixed Die and Tool Department, the IAM sought recognition on behalf of every single production and maintenance job except those occupied by blacks. Id.

On November 19, 1941 the Board certified[4/] the IAM as the bargaining agent for a particular group of workers in the Die and Tool department, Welders, Wheel and Axle, and Truck departments, and Air Brake department; and USW Local 1466 as the collective bargaining agent for all other production and maintenance employees of the Company. PX 14, 15. However, as a result of the NLRB November 1941 certification of the IAM unit, several jobs staffed by blacks were included within the jurisdiction of the IAM. For example, the November certification of the IAM unit included the all-black Truck department, and the all-white Wheel and Axle departments, because the evidence demonstrated that these departments performed a coordinated function and were operationally treated as one department. PX 13, pp. 29-30, 89, 144-48.[5/]

4/ The IBEW was certified to represent electrical workers and powerhouse operators. PX 15.

5/ Also included in the IAM unit at the time of initial certification in November 1941 were jobs staffed by blacks in the racially mixed Die and Tool departments and the racially mixed Wheel and Axle Department. PX 15, 109.

However, the racial integration of the IAM unit was "corrected," and a "clarification" made, by a letter agreement, dated December 19, 1941, reached by the IAM, the Steelworkers and the company.[6/] A 151 n. 13 By this agreement between the parties, entered into immediately after NLRB certification, the all-black Truck Department and all other jobs staffed by blacks, certified by the NLRB to be in the IAM unit, were given to the USW. As a further provision of the agreement the USW ceded to the IAM the jobs held by two white employees which had been certified in its bargaining unit.[7/] (Compare PX 1, 15, 17 pp. 14-16, 109, CX 14.)

6/ The agreement provides that the NLRB's decision "is ... in minor respects inadvertent in the classification of employees as has been recognized both by the company and by the respective bargaining agencies."PX 17, pp. 14-16.

7/ In total, the IAM swapped 24 black employees for 2 whites from the USW. The IAM gave up no whites. PX 1, 15, 17, 109.

In short, the IAM gave its black members to the USW and the USW, in turn, gave two of its white members to the IAM, with the acquiescence of the company and of the Board, thereby maintaining the all-white[8/] nature of the IAM despite the NLRB certification.

The increase in the number of one-race departments after unionization

Efforts to exclude blacks from the IAM unit and the subsequent swapping of jobs between the bargaining units (USW and IAM) in December of 1941 resulted in doubling the number of one-race departments which existed prior to unionization.

8/ The evidence in this record flatly contradicts the company's contention that blacks were included in the IAM at the time of unionization in 1941-42. Co. Pet. 12. In support of this contention, the company makes reference to the welder-helper job, a job in the IAM unit. This record shows 3 blacks in the position of welder helper in 1944. PX 2, 63. There were no blacks in the job when the company was organized and the seniority system was adopted. PX 1, 13, 15, 17, 109. The uncontroverted evidence is that the IAM unit was an all-white unit upon unionization of the company, and subsequent clarification, in 1941-42. PX 1, 17, 109.

As a result of unionization and the subsequent inter-union agreement, see p. 7, supra, five additional one-race departments were created.[9/] In addition to dividing racially the Die and Tool department leaving the all-black remnant in the USW, as well as carving out an an all-white segment from the racially mixed Maintenance department, the IAM and USW also converted a racially mixed department, Wheel and Axle, into a one-race all-white department, by their December 1941 agreement or "clarification."[10/]

9/ The five departments were as follows: (i) The all-black Die and Tool (CIO) department represented by the Steelworkers; the all-white IAM departments, including (ii) Die and Tool (IAM), (iii) Maintenance (IAM), (iv) Wheel and Axle, and (v) Air Brake. PX 1, 13, 17, 109.

10/ Prior to unionization and even after the initial NLRB certification in November 1941, PX 15, the Wheel and Axle department had been racially mixed. PX 109. However, the inter-union agreement caused the Wheel and Axle department to become an all-white department within the IAM unit. PX 1, 13, 15, 17, 109.

1944-54: THE MAINTENANCE OF A DISCRIMINATORY SENIORITY SYSTEM

The 1944-46 manipulations

In 1944 the IAM ceded to the USW the departments in its bargaining unit, with the exception of the all-white Die and Tool (IAM) and all-white Maintenance (IAM), two departments which have remained in the IAM since unionization. The all-white Wheel and Axle[11/] all-white Air Brake Pipe[12/] and the recently racially mixed Welding

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11/ Although racially mixed prior to unionization, the Wheel and Axle department continued to be all-white upon its return to the USW unit. PX 2, 15, 17, 109.

12/ The history of the all-white Air Brake department is instructive when looking at this particular department system. Prior to unionization the three jobs which comprised this department were located in two racially mixed departments. PX 13, p. 85; PX. 17, pp. 14-15. In 1941, these jobs were assigned to the IAM where they formed an all-white department. Then in 1944, the department was transferred back to the Steelworker unit, PX 19, pp. 23-24, disbanded, and its jobs, pipefitter and pipefitter helper, were placed in the racially mixed Steel Erection department where they remained during the period when occupational seniority was used. Finally, in 1954, when departmental seniority returned to Pullman, the white-only Air Brake department was re-established. PX 9.

departments were ceded by the IAM to the USW in 1944.[13/]

An all-white Powerhouse department, which had been created and represented by IBEW at the organization of the company, was disbanded in 1946; those jobs were then placed in a racially mixed department represented by the USW, A 151, PX 2.[14/]

13/ Regarding the racial composition of the 1944 transfer of employees from the IAM to the USW unit, the USW states categorically "80 were white and 20 were black." USW Pet. 11, 18 n.11. This assertion is not supported by the evidence in this case which is that 3 blacks, not 20, were assigned to jobs in the IAM unit in 1944. PX 2, 63, CX 5. Apparently, the Steelworkers relied upon the company's brief in the Court below rather than the record for these statistics. The company admitted in the Court of Appeals that these statistics were based on mere speculation: "The inference might possibly be drawn that as many as 20 of the 100 lost were black ... although there is an element of conjecture in this ". Co. Brief at 21.

14/ During the occupational seniority system (1947-54), the all-white Powerhouse jobs remained in the racially mixed department. A new all-white Powerhouse department was created within the USW unit in 1954 upon the return to a departmental system.

The imposition of occupational seniority (1947-54)

During this seven-year period, there was an occupational seniority system in effect at Pullman. Under the occupational seniority system an employee could hold seniority in only one occupation, except that at the discretion of management an employee could be transferred and hold seniority in two occupations. PX 47, pp. 13-14 (1947 agreement). At this time, many of the one-race departments and the splinter departments created at unionization were re-merged[15/] into the racially mixed departments, represented by the USW, from which they had been separated at the time of unionization. During this period there was a decrease in the number of one-race departments, an increase in the number of racially mixed departments, and the configuration of the departments was broadened. Two all-white departments in the IAM and IBEW units, which were ceded to the USW in 1944 and 1946, respectively, were dis-

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15/ /The all-White Powerhoue and Air Brake Pipe departments were merged into racially mixed departments during this time frame. PX 2-7.

banded; those jobs were then placed in the racially mixed departments where they had been prior to unionization. See, supra, p. 11, nn.12, 14.

The Return to departmental seniority and concomitant changes in departmental structure (1954 to trial)

A company-wide agreement was negotiated with the Steelworkers in August of 1954 which included all Pullman-Standard plants, and in 1956 for the first time the seniority was used for promotional purposes. A 131.[16/] As a result of the 1954 negotiations, Bessemer returned to the departmental seniority system.[17/] However, the system was not imposed upon the departmental configuration

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16/ Previously, seniority, whether departmental or occupational, was used only for purposes of layoff and recall.

17/ Under the departmental system an employee who transfers from one department to another "shall relinquish seniority in the department from which he is transferred and shall start as a new employee in the department to which he is transferred...." See e.g., PX 35, p. 25 (1944 agreement) PX 34 (1954 agreement).

which obtained at the Bessemer plant during the period of occupational seniority (1947-54).

Instead, when the departmental seniority system returned to Pullman (1954-1972), again the racial composition of the departments within the USW unit was altered. More one race departments were created, including some one-job departments, were carved from racially mixed departments, In June 1954, two months prior to the negotiation of, and return to, the departmental system at Bessemer, five brand new, one-race departments were created within the USW unit.[18/] Compare PX 8 with PX 9.

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18 / The Steelworkers misstate the facts regarding the establishment of these one-race departments. The Steelworkers assert that the departments were created during the period when occupational seniority was in effect and thus conclude that the creation of the departments did not harm the employment opportunities of the black workers. USW Pet. 8-10, 17 n.9. In fact, these departments were created just prior to the shift to departmental seniority. PX 8, 9.

The increase in one-race departments

The five one-race departments[19/] included the establishment of one all-black department, Janitors, and four all white departments: Plant Protection, (see Brief, n.21), Boiler House, Power House, and the Air Brake Department. See nn.12, 14, supra; PX 8, 9. The 1954 seniority system at the Bessemer plant remained "virtually unchanged throughout the next eighteen years of collective bargaining." A 131, 158.[20/]

19/ In 1954 another department, Railroad, was created which, except for the highest paying job, was all-black, PX 8, 9.

20/ In 1972 under the direction of the Labor Department an alteration in the system was made to allow a limited opportunity for some of the black employees to promote to formerly white-only jobs without forfeiting their seniority. See A 131-32, 159.